

### **REMARKS**

Claims 1-3, 8-12, 17 and 58-60 are pending in this application. Claims 1, and 10 have been amended without prejudice and without acquiescence. Claims 58-60 have been added. Support for these amendments and new claims can be found in the specification as a whole, particularly paragraphs 0034 and 0036. Applicants assert no new matter has been added.

Outstanding issues in this application are as follows:

- Claims 1-3, 8-12 and 17 have been provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over copending Application No. 10/264,886 and 10/891,895.
- Claims 1-3, 8-12 and 17 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Hand et al (US 5,431,927) in view of Remmereit (US 6,042,869).

#### **I Double Patenting**

Claims 1-3, 8-12 and 17 have been provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over copending Application No. 10/264,886 and 10/891,895. Applicants traverse.

The Court of Claims and Patent Appeals (now the Court of Appeals for the Federal Circuit) has stated: "Once the provisional rejection has been made, there is nothing the examiner and the applicant must do until the other application issues." *In re Mott*, 190 USPQ 536, 541 (CCPA 1976) (emphasis added). MPEP §804 allows for the prosecution to continue while a provisional double-patenting rejection is pending and even instructs the Office to continue to much such provisional rejection until one of the applications issues s a patent.

Thus, Applicants request that this rejection be held in abeyance until the conflicting claims are in fact patented.

## **II. Rejection Under 35 U.S.C. 103(a)**

Claims 1-3, 8-12 and 17 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Hand et al (US 5,431,927) in view of Remmereit (US 6,042,869). Applicants traverse.

Claims 1 and 10 have been amended without prejudice and without acquiescence as to the range of protein added to the composition. Applicants contend the protein ranges in current claims are not taught or suggested by either Hand or Remmereit. Hand et al only teaches protein ranges of 10-35% and Remmereit does not disclose an actual percentage of protein as pointed out by the Examiner (see page 4 paragraphs 2 and 3 of office action dated 4/20/07). Therefore, in view of the pending claims, the references do not teach all limitations of the claimed invention rendering the invention non-obvious. *In re Royka*, 490 F2d. 981, 180 USPQ 580 (CCPA 1974).

In light of the above amendment, the Applicants request that the rejection be removed.

### **CONCLUSION**

In view of the above, applicant believes the pending application is in condition for allowance.

Applicant believes no fee is due with this response. However, if a fee is due, please charge Deposit Account No. 06-2375, under Order No. 54909/HO-P02206US0/10104504 from which the undersigned is authorized to draw.

Dated: June 27, 2007

Respectfully submitted,

By 

Jan K. Simpson

Registration No.: 33,283

FULBRIGHT & JAWORSKI L.L.P.

1301 McKinney, Suite 5100

Houston, Texas 77010-3095

(713) 651-5151

(713) 651-5246 (Fax)

Attorney for Applicant